



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KIAGE & MURGOR JJ.A.)

CIVIL APPLICATION NO. E278 OF 2020

BETWEEN

MANUCHAR KENYA LIMITED.....APPLICANT

AND

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

(Being an application for stay of execution pending the lodging of an intended appeal against the ruling and orders of the High Court (Majanja, J.) delivered 10th August 2020

in

HC ITA No. E067 of 2020)

RULING OF THE COURT

By a Notice of motion dated 3rd June, 2020, brought under *sections 3A*, and *3B* of the *Appellate Jurisdiction Act, rules 5 (2) (b)* and *42* of the *Court of Appeal rules* and *Article 159 (2) (e)* of the *Constitution, the applicant, Manchar Kenya Limited* has sought for a stay of execution against the ruling and orders dated 10th August 2020 (*Majanja, J.*), pending the lodging of an intended appeal.

The motion was brought on grounds that on 10th August 2020, the High Court delivered a ruling in respect of the applicant's Notice of motion dated 11th June 2020 which had sought for time to be extended to file an appeal out of time from the decision of the Tax Appeals Tribunal delivered on 27th March 2016 in *TAT No. 43 of 2016*. The applicant was dissatisfied with the decision of the trial judge which declined to grant the extension sought and now intends to file an appeal against that decision.

In the meantime, the applicant's complaint is that the respondent has levied Agency Notices dated 18th of August 2020 on its bank accounts with NCBA Bank and CFC Stanbic Bank to enforce the collection of taxes of Kshs. 18,902,123 in Corporation Tax and Kshs. 6,529,054.00 in Value Added Tax, which taxes were in dispute before both the Tax Appeals Tribunal and High Court; that this was despite the applicant being in a Value Added Tax credit position to the tune of Kshs. 125,120,404.34 as at 31st July 2020. It was further contended that the respondent has already collected Kshs. 5 million shillings and a further Kshs. 3,666,589.67 worth of taxes, and is scheduled to collect further amounts on the 15th September 2020 and every 15th day of every month until the disputed taxes are paid in full, and that unless this Court grants the orders sought, there is a real risk that the applicant will be forced to close down its operations, breach contractual agreements with third parties and face multiple suits whilst at the same time stare at bankruptcy in the face. It will also have to lay off hundreds of employees that rely on it for their livelihood.

The applicant further complained that it was compelled to execute a Debt Management Agreement with the respondent under duress which was without regard for the prevailing Covid-19 pandemic and the resultant economic downturn in international trade, which had negatively impacted its imports and exports operations. That it is therefore evident that the applicant is in extreme financial distress and the continued enforcement of tax payments will render the intended appeal nugatory. The applicant has an arguable appeal with good prospects of success as set out in the draft memorandum of appeal. The motion was supported by the sworn affidavit of *Ayub Mwachuki*, the applicant's Finance Manager, as well as the applicant's written submissions.

In its replying affidavit sworn by *Victor Andambi Chabala* on 21st September 2020, and in its written submissions, the respondent deponed that the applicant did not appeal against the Tax Appeals Tribunal's decision within the statutory period provided by *section 32* of the *Tax*

Appeals Tribunal Act, and that the motion seeking extension of time to file the appeal out of time was filed 2 years after the impugned decision; that consequently, the High Court rightly declined to grant the applicant's motion which was in any event a mere dismissal that did not require the parties to do anything or to refrain from doing anything. That the order was a negative order that was incapable of execution, and therefore there was nothing to stay. Furthermore, the substratum of the appeal was lost when time within which to appeal against the decision lapsed as a consequence of which, there is no arguable appeal.

It was also deponed that the intended appeal would not be rendered nugatory, since the applicant has not demonstrated through a bank statement or audited accounts that it will suffer substantial loss if stay of execution is not granted. The applicant has also not shown that it will be unable to recover the taxes collected from the respondent in the event the appeal was to succeed. In the alternative, it was deponed should the court be inclined to grant the orders of stay of execution, then the applicant should be ordered to pay 60% of the demanded taxes to the respondent in cash as security.

In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold to be satisfied, as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

Turning to whether the intended appeal is arguable, the applicant has complained that the learned judge was wrong to decline to extend time to file an appeal against the Tax Appeals Tribunal's decision for the reasons that the applicant did not advance any compelling reasons for delay. In considering the issue, we are not persuaded that the intended appeal is arguable for the simple reason that **section 32** of the **Tax Appeals Tribunal Act** is explicit that an appeal against the decision of the Tax Appeals Tribunal required to be filed within 30 days, whereas in this case the applicant sought to file it 2 years after the decision. Given that the arguable aspect has not been met, we need not consider the second limb of the threshold requirements necessary for granting the **rule 5 (2) (b)** orders sought.

As such the Notice of motion dated 3rd June, 2020 lacks merit and fails, and is hereby dismissed with costs to the respondent.

It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR